SUPREME COURT, U.S.
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No. 08-27

In The
Supreme Court of the United States

PETER HELLMUTH EGGERT,
Petitioner,
vs.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent objects to the Petitioners' Questions Presented on the ground that they assume certain jurisdictional, procedural, legal, and factual premises that are demonstrably unfounded, as established more fully in this brief.

Respondent suggests instead the following Questions Presented:

1. Does the Court have jurisdiction under 28 U.S.C. § 1257(a) to review the Texas Eleventh Court of Appeals' decision below, denying Petitioner Eggert's supplemental motion for rehearing, in which Eggert first raised the claims presented here?

2. Should the Court grant a petition for a writ of certiorari where Petitioner failed to follow the appropriate state appellate rules to obtain review of his federal claims?

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Petitioner Peter Hellmuth Eggert[1] filed a petition for writ of certiorari, seeking review of non-existent state-court determinations. As will be established in detail below, no Texas court has ever passed upon the federal claims Eggert now raises in this petition. Eggert first raised the factual bases of his claims—founded upon "newly discovered evidence"—in his supplemental, pro se, motion for rehearing in the Eleventh Court of Appeals of Texas. Appellant's Supplemental Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jul. 9, 2007); Pet. Cert. App. F.[2] Because Texas appellate procedure does not permit new evidence to be presented in such a manner, and the state court of appeals denied his motion for rehearing; it refused to consider the merits of these federal claims. Despite the fact that the Eleventh Court of Appeals[3] could not consider these claims, Eggert again reasserted the new-evidence claims in a petition for discretionary review filed in the Texas Court of Criminal Appeals. That court also refused to consider his new federal claims.

Respectfully, if the Court granted certiorari review in this case, such a decision would change the Court's role in reviewing federal constitutional claims presented on direct appeal, where no state court has ever reviewed those claims. Such a change would require the Court to act as a fact-finder.

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[1] Respondent State of Texas will be referred to as "the State."

[2] Unless otherwise noted, all references to "Pet. Cert." and "Pet. Cert. App." are to the petition and appendix filed in No. 08-27.

[3] The State will refer to the Eleventh Court of Appeals of Texas as the "court of appeals."

JURISDICTION

The Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider any of Eggert's claims on certiorari review because Eggert first raised both the legal and factual basis of the present claims, in his supplemental motion for rehearing filed with the court of appeals. The court of appeals simply denied Eggert's motion for rehearing. Likewise, Eggert's petition for discretionary review was refused. There has never been a final state court judgment or decree for any party with respect to Eggert's current claims. The decisions below thus do not draw into question any matter of federal law relevant to Eggert's petition. Accordingly, the Court lacks jurisdiction under § 1257(a) to review the purely procedural state court determinations not to consider Eggert's federal claims, given Texas appellate procedure.

STATEMENT OF THE CASE

I. Facts of the Crime

The evidence supporting the underlying conviction was succinctly summarized in a prior opinion:

> Peter Eggert and his son Mikel Peter Eggert were indicted for conspiracy to fabricate physical evidence by making, presenting, or using the purported affidavits of Kim Whiteley or M.W. with the knowledge that they were false and with the intent to affect an appeal pending in [the Texas Eleventh Court of Appeals]. The indictments were consolidated, and Peter and Mikel were tried together. The jury

> found both guilty, and the trial court assessed punishment at two years confinement and a $5,000 fine. The trial court probated the term of confinement for five years but not the fine.

Eggert v. State, No. 11-05-00234-CR, 2007 WL 1644580 (Tex. App.–Eastland 2007, pet. ref'd.).[4]

More specifically, Eggert engaged in the legal representation of Marcos Gallardo—in an unrelated case—in an effort to block Gallardo's deportation from the United States. 6 RR 227, 239–48.[5] To block Gallardo's deportation, Eggert attempted to have Gallardo's unrelated state criminal conviction set aside. 6 RR 33–35. Eggert was not licensed to practice law in Texas courts, nor apparently in any federal court. 6 RR 226.

The conviction which Eggert now challenges stems from his attempt to convince the complainant in Gallardo's unrelated criminal case to execute an affidavit that Eggert knew to be materially false, with the intention of submitting that materially false affidavit to the Eleventh Court of Appeals of Texas.

Hence, Eggert was convicted of conspiracy to fabricate physical evidence by making, presenting, or

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[4] The State will refer to this opinion as "*Eggert v. State*, slip op., at [page number]."

[5] "RR" refers to the reporter's record of the proceedings at trial for cause number 12119. There are nine volumes to the reporter's record. The Director will use the following citation format as appropriate: "[volume number] RR [page]."

using a false affidavit, with specific knowledge that it was false, and with the intent to affect an appeal pending in a state appellate court.

II. Direct Appeal

After his judgment of conviction, Eggert filed an appeal—through appellate counsel—with the court of appeals. Eggert raised four issues in his direct appeal: (1) legal and factual sufficiency of the evidence; (2) jury-charge error; (3) ineffective assistance of trial counsel; and (4) the trial court's decision to deny Eggert's motion for new trial. *Eggert v. State*, slip op., at *1. On June 7, 2007, the court of appeals affirmed Eggert's judgment of conviction. *Id.* at *6. Importantly, because Eggert's brief on direct appeal did not include the factual or legal basis of the claims presently before this Court, the court of appeals did not consider those claims. *Id.* at *1.

On June 21, 2007, Eggert filed a pro se, motion for rehearing with the court of appeals. Appellant's Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jun. 21, 2007). On July 9, 2007, Eggert filed a supplemental pro se, motion for rehearing with the court of appeals. Appellant's Supplemental Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jul. 9, 2007); Pet. Cert. App. F.

Eggert's supplemental motion for rehearing is the very first time he referenced certain newly discovered evidence, which he attached to his motion. The court of appeals denied Eggert's supplemental motion for rehearing on or about July 19, 2007, without addressing the new-evidence claims. Pet. Cert. App. C.

Eggert filed a petition for discretionary review with the Texas Court of Criminal Appeals, which that court eventually refused on or about April 3, 2008. Pet. Cert. App. E.

REASONS FOR DENYING THE WRIT

I. The Court Lacks Jurisdiction to Review Eggert's Claims.

As stated above, the Court lacks jurisdiction under 28 U.S.C. § 1257(a) to consider Eggert's petition because there is no existing "judgment"—final or otherwise—in relation to Eggert's claims. While this Court generally has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." *see* 28 U.S.C. § 1257(a), no final judgment exists—at least with respect to the present federal claims—upon which to base such jurisdiction.

Specifically, § 1257(a) establishes a "firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). As the Court explained, to constitute a final, reviewable judgment for purposes of § 1257, the state court's decision must be "final as an effective determination of the litigation and not merely of interlocutory or intermediate steps therein." *Id.* "It must be the final word of the final court," final and binding on the state court proceedings. *Id.* The requirement of finality in § 1257 "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Finally, to assist in its determination of whether a reviewable "final judgment" has actually been rendered, the Court will examine "both the judgment and the opinion as well as other circumstances which may be pertinent." *Gospel Army v. City of Los Angeles*, 331 U.S. 543, 548 (1947).

Application of the Court's precedent makes clear that no court has ever entered a final judgment or decree in reference to Eggert's present claims. Nor has any court ever considered or passed on the factual or legal bases thereto. The court of appeals simply denied Eggert's supplemental motion for rehearing; the motion in which Eggert first attached the present "new evidence" claims. Pet. Cert. App. C. Likewise, the Texas Court of Criminal Appeals simply refused Eggert's petition for discretionary review, a refusal to review the legal determinations actually made by the court of appeals. *See Sotelo v. State*, 913 S.W.2d 507, 509 (Tex. Crim. App. 1995) ("This Court reviews only 'decisions' of the courts of appeals; we do not reach the merits of any party's contention when it has not been addressed by the lower appellate court."); Pet. Cert. App. E. No court has adjudicated the rights Eggert now claims were violated. Since there were no decisions below related to Eggert's present federal claims, this Court does not have jurisdiction to consider those allegations on certiorari review. 28 U.S.C. § 1257(a); *Jefferson*, 522 U.S. at 81.

To the extent, if any, Eggert may contend that either the court of appeals' denial of his supplemental motion for rehearing, or the Court of Criminal Appeals' refusal to consider his petition for discretionary review, constituted an adjudication of his claims, as established below, Eggert is simply incorrect.

The new evidence Eggert first submitted to the court of appeals purports to be a certified copy of the "Original List of Petit Jurors for the 266th District," for his trial. *See* Appellant's Supplemental Motion for Rehearing, *Eggert v. State*, No. 11-05-00234-CR (Tex. App.–Eastland, Jul. 9, 2007); Pet. Cert. App. at F. However, the Texas appellate courts have no discretion to consider factual allegations that are outside of the record on appeal:

> An appellate court may not consider factual assertions that are outside the record, and a party cannot circumvent this prohibition by submitting an affidavit for the first time on appeal. While the record may be supplemented under the appellate rules if something has been omitted, the supplementation rules cannot be used to create new evidence.

Whitehead v. State, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004). The Texas appellate courts could not consider the factual basis of Eggert's claims. *Id.* Without the capacity to consider the petit jury list, the Texas courts could not have passed on Eggert's federal claims.

Thus, the pertinent circumstances make evident that *no* resolution of Eggert's present federal claims—much less a *final* resolution—was ever had in the State courts. Hence, Eggert's petition for the writ of certiorari should be denied because the Court has no jurisdiction pursuant to 28 U.S.C. § 1257(a).

II. In The Alternative, This Court Will Not Address Federal Claims Not Properly Raised in the State Courts.

A. Eggert failed to raise his federal claims in a procedurally proper manner.

"With very rare exceptions," the Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Indeed, where the state courts have not "expressly" addressed a federal question, a petitioner must affirmatively show that the federal question was actually addressed. *Id.* And where, "the highest state court is *silent* on a federal question before us, we assume that the issue was not properly presented." *Id.* (emphasis added).

Finally, and more specifically, raising a federal claim for the first time in a motion for rehearing is generally insufficient to properly raise that claim. *See Hanson v. Denckla*, 357 U.S. 235, 243–44 (1958); *see also Radio Station WOW, Inc.*, 326 U.S. at 120, 128 ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . .").

Eggert fails to properly invoke the jurisdiction of the Court: he fails to show that the present federal questions were properly raised or resolved in the state courts. The only state appellate court "resolutions" made after Eggert first improperly asserted the factual and legal basis of his claims, were to *refuse* their consideration, and those resolutions were utterly silent

regarding the merits thereto. Pet. Cert. App. C, D, E. Eggert fails to present the Court with a judgment or opinion in which any state court adjudicated the merits of his claims (there is none); hence, Eggert's petition for the writ of certiorari should be denied. *Adams*, 520 U.S. at 86; *Radio Station WOW, Inc.*, 326 U.S. at 120, 128.[6]

B. **Eggert's claims are waived.**

Failure to follow appropriate state appellate rules to obtain review of a federal claim usually bars consideration of that claim in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) ("The long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."); *see also Adams v. Robertson*, 520 U.S. at 89 ("[W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question."); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) ("Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal."). By filing his new evidence claims in a procedurally inappropriate manner, Eggert waived consideration of these claims in this Court.

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[6] In addition, Eggert fails to fully and properly discuss the manner in which his claims "were passed on by those [state] courts . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction. *See* Sup. Ct. R. 14.1 (g)(i).

III. In The Alternative, This Court Will Not Address Federal Claims Where the Possibilities of Review By All State Courts Have Not Been Exhausted.

As the Court held in *Gorman v. Washington University*, "no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities of review by all state courts have been exhausted." 316 U.S. 98, 100 (1942). The purpose of the rule outlined in *Gorman* is "to prevent our interference with state proceedings when *the underlying dispute may be otherwise resolved.*" *Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (per curium) (emphasis added); *but cf. Largent v. Texas*, 318 U.S. 418, 421–22 (1943).[7]

Here, Eggert is required to raise the factual and legal basis of his claims—and the Texas Court of Criminal Appeals is permitted to *resolve* those claims—in a proper procedural context: by filing an application for state writ of habeas corpus.[8] Tex. Code Crim. Proc. art. 11.07 (West 2008); *see Whitehead v. State*, 130 S.W.3d at 872 (demonstrating that Texas appellate courts could not consider Eggert's "new evidence" for the first time on appeal). The state collateral proceeding is the

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[7] "The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant." *Largent v. Texas*, 318 U.S. at 421–22.

[8] Upon exhausting his claims in the state habeas proceedings, Eggert could seek redress in the federal courts—and ultimately this Court—by filing a petition for federal habeas corpus. *See* 28 U.S.C. § 2254.

appropriate venue to advance non-record allegations in support of a new constitutional claim.

While *Largent* suggests that the mere possibility a criminal defendant might obtain review of a federal claim in a subsequent proceeding (*e.g.*, habeas corpus), does not render an otherwise "final" judgment non-reviewable, where—as here—the state procedure requires resolution in that subsequent procedure, *Largent* should be inapplicable. *See Largent v. Texas*, 318 U.S. at 421–22.

Here, Texas (direct) appellate procedure bars Eggert from raising his claims in the manner he did below; hence, this Court should not resolve his federal claims until he gives the state courts an opportunity to address them, in a procedurally appropriate manner. *Gorman*, 316 U.S. at 100; *Costarelli*, 421 U.S. at 196.

IV. The State Is Unable To Address The "Merits" Of Eggert's Claims Because The Factual Bases Are Unauthenticated, And Because They Have Never Been Reviewed By Any Court.

Eggert makes several factual assertions in support of this petition. Because those assertions require further factual development, the State is unable address their underlying merits. The State will briefly address four of Eggert's factual contentions.

A. The "original" petit jury list.

No court has ever verified or authenticated the "original" petit jury list that Eggert first "discovered" and attached to his supplemental motion for rehearing.

Without such a determination, Eggert's claims are unsubstantiated. Indeed, even assuming, *arguendo*, the authenticity of the "original" petit jury list, without further factual development of Eggert's claims, no court can ever determine whether a"shuffle"—if any—was the result of a state act, or whether it was done with the consent, or at the request of trial counsel.

B. The "father" of the district attorney.

Eggert claims that the "father of the elected, but recused, district attorney" was seated on his venire-panel. Pet. Cert. at 12. This contention is unsupported, and has never been submitted to a tribunal for review.

The factual contention is particularly problematic because the venire-member spells his name differently than does the district attorney.[9]

C. The "daughter" of a grand-juror.

Eggert claims that the "daughter of a grand juror" was seated on his venire-panel. Pet. Cert. at 12. The trial transcript supports this contention, but also demonstrates that, (i) this relationship was disclosed to all parties during voir dire, (ii) that she did not know if her father's grand-jury was involved in Eggert's case, and (iii) her father had not discussed the case with her. 5 RR 66–67.

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[9] *See* Pet. Cert. App. at 38 (indicating that the venire-member spells his name "Terrell"); *see also*, Erath County District Attorney website, (visited October 22, 2008) <http://www.co.erath.tx.us/ips/cms/districtcourt/districtAttorney.html> (indicating that the district attorney spells his name "Terrill").

Indeed, it is conceivable that defense counsel believed that she would be a favorable juror, and wanted her to serve thereto.

D. A county court at law judge.

Eggert claims that the "judge of the county court at law" was seated on his venire panel. Pet. Cert. at 12. The trial transcript supports this contention, but also demonstrates that, all parties immediately recognized the county judge, and he was dismissed without objection (*i.e.*, defense counsel did not have to utilize a peremptory challenge). 5 RR 9, 11, 18, 24, 39–40, 75, 87.

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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